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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

AMOCO PRODUCTION COMPANY,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below erred in holding, in conflict with at least one other circuit, that the EEOC's failure to meet the statutory prerequisites to commencing an enforcement action in its own name does not affect its ability to conduct that enforcement action as a permissive intervenor in a private action, even after the private parties' claims have been settled and dismissed?

2. Whether the decision of the court below effectively removes constraints on the prosecution of Title VII class action litigation vital to the sound administration of the Act by holding that the EEOC, acting as a permissive intervenor in an action otherwise involving only private parties, is required to satisfy neither the administrative prerequisites to a government enforcement action prescribed in the statute nor the prerequisites to a class action prescribed in Rule 23 of the Federal Rules of Civil Procedure?

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Amoco Production Company respectfully prays that a Writ of Certiorari issue to review the opinion, judgment and order of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 768 F.2d 669, and has been reproduced in Appendix A hereto. The decision of the district court was unreported. It has been reproduced in Appendix B hereto. The district court also issued an unreported order denying rehearing, which has been reproduced in Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 16, 1985. This petition for certiorari was filed within 90 days of that date. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved most directly herein are Sections 706(b) and 706(f)(1) of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-5(b), 2000e-5(f)(1) (1980), and Rule 24(b) of the Federal Rules of Civil Procedure. These provisions have been reproduced in Appendix D hereto.

STATEMENT OF THE CASE

This case was brought as a private class action by four black employees of Petitioner, Amoco Production Company ("Amoco").[1] They claimed that Amoco had discriminated against them and its other black employees with respect to hiring, initial assignments, promotions and pay. App. 3a.[2] The plaintiffs sought to represent a class of all blacks employed at Amoco's New Orleans, Louisiana, facilities. *Id.*

Only three of the four private plaintiffs had previously filed individual charges of discrimination with the Equal Employment Opportunity Commission ("EEOC" or "Commission"). App. 3a n.2. Plaintiffs Lillie Jean Smith and Hardy J. Osborne asserted in their charges that Amoco had denied them promotions because of their race. R. 1946, 1948. Jacqueline M. Harris complained

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[1] Petitioner Amoco Production Company is a wholly-owned subsidiary of Amoco Corporation, an Indiana Corporation.

[2] References to the appendices are designated by "App. ——." References to the original record are designated by "R. ——."

of having been a victim of discrimination in her initial job assignment, as well as having been denied promotions for racial reasons. R. 1941. Plaintiff Robert Williams filed no charge with the EEOC. R. 1943.

The Commission made no findings with respect to the charges of Mr. Osborne or Ms. Harris. App. 3a n.2. It did find reasonable cause to believe Ms. Smith's charge of discrimination with respect to Amoco's failure to promote her. *Id.*

The Commission decided not to file an enforcement action on Ms. Smith's charge, and on August 25, 1976, advised Ms. Smith that, "[t]he Commission has determined that it will not bring a civil action against the respondent(s) based on your charge and accordingly is issuing you this Notice of Right to Sue."[3] R. 2313; App. 3a n.2. Thereafter, the EEOC issued right-to-sue notices on the Harris and Osborne charges. App. 3a n.2.

On December 10, 1976, the four plaintiffs jointly filed the instant complaint. R. 1. One year later, on December 20, 1977, the EEOC moved for permissive intervention in the same action. R. 322, App. 3a. The EEOC stipulated to limiting its intervention to the "field of litigation" established by the original plaintiffs. App. 5a. The District Court granted the intervention over Amoco's objection. *Id.*

A. The District Court Dismissed The EEOC's Complaint In Intervention After Class Certification Had Been Denied And The Named Plaintiffs Had Settled Their Individual Claims.

After discovery, plaintiffs moved for class certification under Fed. R. Civ. P. 23. App. 6a. The EEOC joined in

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[3] It is disputed on the record whether the EEOC made any meaningful effort to conciliate Ms. Smith's claim with Amoco. App. 13a n.10.

that motion. R. 597. After due consideration, the District Court found insufficient record support for a class certification and denied plaintiffs' motion. App. 6a. Thereafter, the plaintiffs settled their individual claims with Amoco and requested dismissal of their private complaints. App. 7a.

The district court dismissed the private action and simultaneously dismissed the Commission's complaint in intervention. App. 7a. The court held that no live controversy remained between the Commission and Amoco after the class had been dismissed and the private claims had been settled. App. 36a. Relying upon the Sixth Circuit decision in *Horn v. Eltra Corp.*, 686 F.2d 439 (6th Cir. 1982), the district court found that the Commission had no independent authority to seek class relief as a permissive intervenor after the original plaintiffs' case was dismissed.[4] App. 37a. It further relied upon *Horn v. Eltra* in holding that *General Telephone Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980), which found that the Rule 23 limitations were not applicable to EEOC enforcement actions, was inapposite to cases where the EEOC was a permissive intervenor in a private class action. App. 37a.

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[4] In *Horn v. Eltra*, the Sixth Circuit noted that Title VII gives the EEOC enforcement authority to litigate in its own name only after it has (1) investigated a proper charge, (2) found reasonable cause of a violation of the statute based on the charge and (3) sought unsuccessfully to conciliate the reasonable cause findings. 686 F.2d at 441 (citing Sections 706(b) and (f)(1)). It found that the permissive intervention provision of Title VII did not grant the EEOC the power to proceed as an "intervenor of right" or as an original party. *Id.* at 441-42. Accordingly, the Sixth Circuit held that the EEOC, consistent with traditional notions of permissive intervention, was permitted only an ancillary role to the plaintiffs' action. Absent compliance with the procedural requirements for conducting an enforcement action, the circuit court found that the EEOC had no independent jurisdictional base that would survive dismissal of the plaintiffs' case. *Id.*

B. The Court Of Appeals Held That The EEOC's Permissive Intervention Survived The Dismissal Of The Original Action And Was A Valid Enforcement Complaint Regardless Of Whether The EEOC Had Complied With The Statutory Prerequisites To Initiating Suit In Its Own Name.

The Fifth Circuit reversed the district court's dismissal of the EEOC's complaint in intervention. It held that the EEOC had authority to conduct an enforcement action as a permissive intervenor irrespective of whether the EEOC had fulfilled the statutory preconditions for a direct enforcement action. App. 12a-24a. It further disagreed with the "dictum" of *Horn v. Eltra* which stated that the EEOC, as a permissive intervenor, was subject to the limitations of Rule 23 concerning the scope of any class determination. App. 26a-27a & n.26.

Recognizing the absence of statutory language to support its position, the Fifth Circuit ruled that "courts can, given the appropriate circumstances, equitably modify their application of the statutory terms." App. 19a. The court then found that the general purposes of the statute required that the EEOC be permitted to conduct an enforcement action as a permissive intervenor. According to the court, the purposes of the statutory preconditions to an enforcement action were to avoid litigation, and this purpose could not be achieved once a private action had been filed. App. 16a. The court also cited the general purposes of the statute to justify the exception here from the general legal principle that permits only in exceptional circumstances the continuation of litigation by a permissive intervenor after the original party's action has been dismissed. App. 23a-24a.

In sum, the Fifth Circuit decided that the Commission could pursue classwide claims in intervention (1) despite dismissal of the original private action into which the Commission had permissively intervened, (2) regardless of whether the Commission would have been capable of

initiating a direct enforcement action on those claims in the first instance, and (3) notwithstanding the district court's determination that the requirements of Rule 23 had not been met in this case. This decision, the court noted, was in "tension" with *Horn v. Eltra.* App. 23a n.21.

REASONS FOR GRANTING THE WRIT

This case squarely presents for the first time in this Court the important question of whether the EEOC has the power, through the vehicle of permissive intervention, to transform a Title VII action initiated by private plaintiffs into a full-blown government enforcement action despite the fact that the EEOC had never satisfied the statutorily prescribed administrative prerequisites to a direct enforcement action. In resolving this question in the EEOC's favor and in departing from the conclusion reached with respect to the same issues by the Sixth Circuit, the court below created a conflict in the circuits that must now be resolved by this Court. Further, the need for prompt resolution of this conflict is made more urgent by the fact that the issues of legislative purpose determined by the Fifth Circuit give rise to vitally important questions of national policy regarding the sound administration of Title VII and the conduct of litigation under the Act.

Each of the points mandating the issuance of a writ of certiorari in this case—the conflict in the circuits and the important questions of national policy that it implicates —is addressed in turn below.

A. The Decision Below Is Squarely In Conflict With The Sixth Circuit's Holding In *Horn v. Eltra Corp.*

The Fifth Circuit's decision below permits the EEOC to seek court enforcement as a permissive intervenor in a private action on issues that it was precluded from litigating under its own name in a direct enforcement action. This anomolous result is squarely in conflict with

an earlier decision of the Sixth Circuit and is not justified by the statutory language or purposes.

In *Horn v. Eltra*, the Sixth Circuit was faced with issues identical in all material respects to those raised in the present case and reached precisely the opposite result. There, as here, the EEOC had intervened in a private class action, but had not met the procedural prerequisites to commencing an action in its own name. 686 F.2d at 440. Following the EEOC's intervention, the named plaintiffs' motion for class certification was denied, the named plaintiffs settled their individual claims and the underlying private action was dismissed. *Id.* On appeal from an order of the district court revoking the EEOC's intervention, the Sixth Circuit held that the denial of class certification and the settlement of the named plaintiffs' claims precluded the EEOC from seeking further relief in the action as a permissive intervenor.

The disagreement between the Fifth and Sixth Circuits centers on whether the EEOC, as a permissive intervenor in a private Title VII action, is required to comply with the statutory prerequisites to initiating a direct enforcement action before it can press its claims independently of the original parties in the private suit. On this precise issue, the circuits are in direct conflict.

The statute limits the EEOC's power to seek enforcement. Before it can proceed under its own name, the EEOC must have received a timely charge, investigated that charge, determined there is reasonable cause to believe that allegations in the charge are true and failed to obtain a conciliation agreement on those determinations. §§ 706(b), 706(f)(1); *see EEOC v. Pierce Packing Co.*, 669 F.2d 605, 608 (9th Cir. 1982) ("Genuine investigation, reasonable cause determination and conciliation are *jurisdictional* conditions precedent to suit by the EEOC . . . .") (emphasis added). The EEOC's enforcement action then is limited to the scope of the issues sub-

ject to conciliation. *Id.*; *accord EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 18-19 (2d Cir. 1981); *EEOC v. General Electric Co.*, 532 F.2d 359, 366 (4th Cir. 1976).

The court below found these statutory prerequisites to an EEOC court enforcement action not relevant where the EEOC intervenes in an existing action. It found that the statute's grant of permissive intervention authority to the EEOC provided the jurisdictional basis for the EEOC to bring a direct enforcement action through the device of permissive intervention. App. 21a-24a. It further concluded that the direct action prerequisites were designed merely to avoid litigation, and that this purpose could not be achieved once the private action had been filed. App. 16a. In short, the court below found the EEOC could, once permissive intervention was granted, participate in the private litigation as an original party without the restriction of the statutory prerequisites.

The Sixth Circuit's decision in *Horn v. Eltra* not only is in disagreement with the direct holding of the court below, but also it disagrees with the court's fundamental conception of the statutory scheme. It rejected the contention that the statute provided the intervening EEOC with the status of an "original party." 686 F.2d at 441-42. It found that the statute—which uses the traditional language of permissive intervention, and not intervention as of right—did not incorporate the language Congress has used in other contexts when it chose to confer "original party status" upon an intervenor. *Id.*[5] Accordingly, the

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[5] The Sixth Circuit cited Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976), as an instance where the statutory language provided "original party" status rather than mere permissive intervention. 686 F.2d at 441-42. *See also* Ruotolo v. Ruotolo, 572 F.2d 336 (1st Cir. 1978), where the absence of special language was found to prohibit the government from continuing litigation as a permissive intervenor after the private parties' case was dismissed.

The court below, although recognizing that the "absence of similar language" favored the interpretation made by the Sixth Circuit,

Sixth Circuit held that the EEOC's participation in the private action was subject to the traditional legal principles governing permissive intervention—*i.e.*, that the intervenor's action survives dismissal of the original parties' action only upon very limited exceptions. 686 F.2d at 440.

The Sixth Circuit found neither of the two recognized exceptions applicable to the EEOC's intervention in the circumstances presented here. *Id.* at 441. First, it found that the EEOC did not fall within the "independent jurisdictional basis" exception because the EEOC had failed to meet the statutory prerequisites for establishing jurisdiction. *Id.* Second, it found that the EEOC could not keep the case alive under the *Sosna*[6] exception. Denial of class certification eliminated any claim that the EEOC was acting as a class action intervenor, protecting class members after the plaintiffs' claims became moot. 686 F.2d at 441.

Having found that the EEOC had no legal basis for continuing the suit after the private action was dismissed, the Sixth Circuit dismissed the EEOC's action. This decision directly conflicts with the holding of the court below that the EEOC can continue an action under the same factual situation. The holdings of the two courts not only are in conflict, but they conflict in important underlying statutory interpretations as to whether the intervention provision gives the EEOC rights as an original party, whether the EEOC must comply with the statutory prerequisites under Section 706(f)(1) before it can seek enforcement through permissive intervention, and whether

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chose to ignore this difference in favor of its determination that the EEOC's participation in these cases "serves the statutory purpose." App. 24a n.22, 21a n.20.

[6] Sosna v. Iowa, 419 U.S. 393 (1975).

the EEOC, as a permissive intervenor, can seek class relief without compliance with Rule 23.[7]

The court below, although it "recognize[d] that our holding is *in tension* with that of the Sixth Circuit in *Horn v. Eltra* . . . ," (App. 23a n.21) (emphasis added), sought to distinguish *Horn v. Eltra* on factual grounds. While *some* factual differences exist between *Horn v. Eltra* and this case, they do not by any means eliminate the conflict between the circuits. In seeking to distinguish the present case from *Horn v. Eltra*, the court below said:

> The Sixth Circuit did not affirm the district court's dismissal, which, judging from the panel opinion, could have been based either on an exercise of the court's discretion under Rule 24(b) or on a ruling as a matter of law under Title VII. Rather, the court of appeals dismissed the appeal as moot, thereby indicating that the court viewed the Commission as attempting to intervene in a nonexistent suit rather than as trying to maintain its claims as a valid party to the action. Indeed, its holding was based almost entirely on cases involving attempts to intervene where some or all of the original plaintiffs' claims had already been dismissed, *see id.* at 440-41, and at least one district court of that circuit has so

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[7] The differences between the two circuits are aptly illustrated by their approaches to the Rule 23 issue. The Sixth Circuit's approach to Title VII's intervention provision is that Congress limited the EEOC to traditional permissive intervention. Absent compliance with the statutory prerequisites, the EEOC is limited to the issues legitimately raised by the parties and cannot expand the litigation. Accordingly, the EEOC in that traditional intervention role is limited in the class portion of the case by the original parties' need to comply with Rule 23. *Id.* at 441 n.1. The Fifth Circuit maintains that the EEOC's intervention is not limited and it is simply a matter of choice for the EEOC whether to intervene or proceed under its own name. Accordingly, once the EEOC has intervened, the EEOC is not subject to Rule 23. In the Fifth Circuit's view, "[t]he EEOC's ability to maintain suit 'in its own name' has no meaning apart from whatever relief the Commission obtains for employees . . . ." App. 26a.

> interpreted the holding in *Horn*, *see EEOC v. Dayton Tire & Rubber Co.*, 573 F. Supp. 782, 786 n.5 (S.D. Ohio 1983).

Id.

This attempt to minimize an obvious conflict between circuits must fail. The Sixth Circuit's decision to dismiss the appeal as moot was not based on a finding that the EEOC was attempting to intervene in a nonexistent action. It was based on the conclusion that "the EEOC [was] without an independent jurisdictional basis upon which to litigate against Eltra . . . ." 686 F.2d at 442. That being so, the court found no reason to reach the merits of the EEOC's appeal—*i.e.*, whether the district court erred in withdrawing the EEOC's intervention authority while the private case was still pending—when even a favorable decision on that issue would not have allowed the EEOC to continue to pursue its complaint in intervention. If, in fact, the Sixth Circuit had viewed the case as one involving an attempt to intervene *ab initio*, it would not have devoted the bulk of its opinion to considering whether the EEOC's intervention should be permitted, like the intervention of the Justice Department in *Spangler*, "to *survive* the mootness of the original party plaintiff's claim . . . ." *Id.* at 441 (emphasis added). Accordingly, the conflict between the circuits is real, is important, and must be resolved.

B. This Conflict Between Circuits Presents Important Policy Questions Concerning The Judicial Administration Of Cases Arising Under Title VII, Requiring The Exercise Of This Court's Certiorari Jurisdiction.

In addition to the conflict in the circuits, the decision below raises important considerations and differences among the circuits that promise to interfere with the sound administration of EEOC litigation arising under Title VII. This case presents the appropriate forum for resolution of the EEOC's public role in private litigation.

In *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), this Court found it necessary to rein in the lower courts' enthusiasm for broad, "across-the-board" class actions brought under Title VII by re-emphasizing the need for rigorous compliance with the requirements of Rule 23 in Title VII actions as in all others. Similarly, the courts of appeals have uniformly reflected related concerns with the manageability of Title VII litigation and with fairness to defendants in insisting that the EEOC must satisfy the statutory prerequisites to an enforcement action before such an action can be prosecuted. *See, e.g., EEOC v. Magnolia Electric Power Ass'n*, 635 F.2d 375, 378 (5th Cir. 1981) ("When the EEOC ignores, fails to obey or capriciously deprives a respondent of its administrative procedures, no suit may be prosecuted against that respondent regardless of prejudice.").[8] The Fifth Circuit decision here threatens to undermine these recent advances toward the manageability of Title VII litigation in favor of broad, unlimited EEOC litigation.

At the Fifth Circuit's invitation, it will now be possible for the EEOC to circumvent the congressionally prescribed prerequisites to litigation by the simple expedient of waiting for a private plaintiff to commence his or her own action. Then, by intervening, the Commission can transform that action into a government enforcement action with all the attributes of an enforcement action brought by the EEOC, but without the limitations sought to be obtained by the statutory prerequisites.

At the same time, the Commission will be able, by invoking the Fifth Circuit's opinion and this Court's deci-

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[8] *See also* Wright v. Olin Corp., 697 F.2d 1172, 1176 (4th Cir. 1982) (holding that "for each type of discrimination alleged in the complaint the EEOC must have made a reasonable cause determination and attempted conciliation between the employer and employees").

sion in *General Telephone*,[9] to vitiate the progress toward manageability of Title VII cases that *Falcon* represents. Thus an action that began as one subject to the strictures of Rule 23 would be transmuted into an action in which Rule 23 would be irrelevant. In effect, then, the Fifth Circuit's decision has endowed the EEOC with the power to revive the unlimited "across-the-board" class action that this Court was at some pains to circumscribe in *Falcon*.

It is apparent from the decision below that the Fifth Circuit gave insufficient consideration to the far-reaching implications of dispensing with both the statutory prerequisites to EEOC litigation and Rule 23 whenever the Commission enters a pending private action as an intervenor. For example, one of the court's major rationales for excusing the EEOC's failure to comply with the congressionally prescribed prerequisites to litigation was that the purpose underlying the prerequisites—which the court assumed was "primarily to avoid litigation"—could no longer be served once litigation had already been commenced by a private party. Thus, it said,

> It would defy reason to require compliance with procedural prerequisites whose raison d'etre—namely, the desire to avoid premature litigation—is absent. Where the parties are already in court pursuant the statutory scheme, the day for complying with the calisthentics of an alternative route has come and gone.

App. 16a.

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[9] In *General Telephone*, this Court held that the EEOC need not comply with the requirements of Rule 23 in actions brought by the Commission in the first instance "in its own name." 446 U.S. at 324-25, 330. In its decision below, the Fifth Circuit held that "we see no reason not to apply the holding of *General Telephone* to cases where the Commission seeks to enforce the Act by intervening rather than by bringing a direct action." App. 26a.

But this rationale completely ignores other important interests served by the statutory prerequisites—those of limiting the scope of the litigation to claims encompassed by reasonable cause determinations of possible discrimination and of clearly identifying for the respondent the precise scope of the claims and issues that he will be required to defend if conciliation fails. "Two important purposes are served by this preadjudicative administrative procedure: first, the employer is fully notified of the violation alleged by the charging party; and second, the EEOC has the opportunity to consider all the charges and to attempt their resolution through conciliation and voluntary compliance." *EEOC v. American National Bank*, 652 F.2d 1176, 1185 (4th Cir. 1981), *cert. denied*, 459 U.S. 923 (1982).

The notice function to be served by the issuance of reasonable cause findings and conciliation has become particularly important in light of judicial pronouncements that the scope of subsequent litigation need not be confined to those claims and issues set forth in the administrative charge of discrimination, but may encompass new issues arising out of a reasonable investigation of the charge filed.

> In other words, the original charge is sufficient to support action by the EEOC as well as a civil suit under the Act for *any discrimination stated in the charge itself or developed in the course of a reasonable investigation of that charge*, provided such discrimination was included in the reasonable clause determination of the EEOC and was followed by compliance with the conciliation procedures fixed in the Act.

General Electric, 532 F.2d at 366 (emphasis in original) (footnote omitted).

Thus, the elimination by the Fifth Circuit of both the statutory prerequisites and Rule 23 deprives Title VII defendants in actions in which the Commission inter-

venes of the two mechanisms necessary for meaningful assessment of the scope of the action with which they are faced, and hence denies them access to one of the most vital pieces of information bearing on the appropriateness of settlement. This in turn impinges on that aspect of the statutory purpose to which the Fifth Circuit was wont to assign overweaning importance—the voluntary resolution of disputes arising under the Act.

Moreover, this state of affairs necessarily will lead to precisely the chaotic situation that an earlier panel of the Fifth Circuit feared might be precipitated by exempting the EEOC from the requirements of Rule 23 alone:

> If EEOC is exempted from Rule 23, chaos in the management of Title VII class actions could result. Such matters as notice, exclusion, intervention, dismissal or compromise, and statute of limitations treatment would be put in question.

EEOC v. D.H. Holmes Co., 556 F.2d 787, 796 (5th Cir. 1977), *cert. denied*, 436 U.S. 962 (1978).[10]

Since this Court issued its opinion in *General Telephone*, there already have been at least three cases reported in which the Commission has intervened in a private class action for the purpose of pursuing classwide relief while maintaining that it was exempt from the requirements of Rule 23.[11] The Commission now can simply ignore its statutory mandate, file blanket interventions in private Title VII actions and await the de-

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[10] Four members of this Court expressly endorsed this reasoning of the Fifth Circuit in noting their dissent to the majority opinion in *General Telephone*. *See* 446 U.S. at 334 (Burger, C.J. and Powell, Rehnquist and Stevens, J.J., dissenting).

[11] In addition to this case, the Commission has sought classwide relief as an intervenor in United Telecommunications, Inc. v. Saffels, 741 F.2d 312 (10th Cir.), *cert. denied*, 105 S.Ct. 1776 (1984), and Fields v. Beech Aircraft Corp., 95 F.R.D. 1 (D. Kan. 1981).

nial of class certification before expending its legal resources. Indeed, the Fifth Circuit virtually invited this development when it said, "if the Commission views a complaint to be unworthy of a reasonable cause determination . . . it can issue a right-to-sue letter to the claimant without sacrificing the administrative role. Upon concluding that a private Title VII suit is important, the Commission need only say so to intervene." App. 15a. Before this becomes the preferred method of EEOC litigation, this Court should pass on whether such an approach can be reconciled with the statutory scheme prescribed by Congress.

The need for guidance from this Court is further exacerbated by the fact that this case arises in the context of a broader disagreement among the circuit courts over the appropriate interrelationship between private litigation and government enforcement actions. For instance, although two circuits have held that "once the charging party has filed suit pursuant to a 'right to sue' notice, the Commission is relegated to its right of permissive intervention," *EEOC v. Missouri Pacific Railroad Co.*, 493 F.2d 71, 75 (8th Cir. 1974); *EEOC v. Continental Oil Co.*, 548 F.2d 884 (10th Cir. 1977), the Fifth Circuit has joined the Third and Sixth Circuits in holding that the EEOC's enforcement powers are independent of private action rights, stating:

> a grant of permissive intervention does not guarantee that the EEOC will be able to raise issues that have arisen in the investigation of a claim on which the private party has sued, when the issues the EEOC seeks to litigate are not raised by the private party. We believe the remedy for this is not to expand the concept of intervention beyond its normal meaning, but to allow the EEOC to bring suit based on the findings that its investigation warrants.

EEOC v. Huttig Sash & Door Co., 511 F.2d 453, 455 n.2 (5th Cir. 1975) (quoting *EEOC v. Kimberly-Clark Corp.*,

511 F.2d 1352, 1363 n.15 (6th Cir.), *cert. denied*, 423 U.S. 994 (1975)); *see also EEOC v. North Hills Passavant Hospital*, 544 F.2d 664 (3d Cir. 1976) (Commission enforcement powers are independent of private action rights.). Thus, this case provides a vehicle for this Court to put to rest confusion that has reigned for a decade or more over such fundamental issues as the effect of the commencement of private litigation on Commission enforcement powers and the effect of Commission intervention in pending private litigation.

That assistance from this Court is needed is evident also in the Fifth Circuit's own characterization of the issues in this case:

> Faced too with a confluence of devices designed in part to address the far-reaching effects of a single lawsuit—the class action, intervention, and an agency's very authority to seek judicial enforcement—courts are at times bedeviled by the complexity involved in assessing the effects of these "public" elements on the individual cases before them.
>
> This is one of those times.

App. 2a-3a. These questions are so fundamental and their implications so far-reaching, that this Court should withhold no longer the sorely needed benefits of its guidance.

CONCLUSION

For the foregoing reasons, Petitioners pray that a Writ of Certiorari be issued to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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November 14, 1985

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 83-3665

JACQUELINE M. HARRIS, et al.,
Plaintiffs,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Intervenor-Appellant,

v.

AMOCO PRODUCTION CO.,
Defendant-Appellee.

Aug. 16, 1985

Appeal from the United States District Court
for the Eastern District of Louisiana

Mark S. Flynn, Irene L. Hill, E.E.O.C., Appellate Services Div., Washington, D.C., for intervenor-appellant.

McGuiness & Williams, Douglas S. McDowell, Robert E. Williams, William S. Franklin, Washington, D.C., for amicus Equal Employment Advisory Council.

Wayne S. Bishop, Richard K. Walker, Washington, D.C., for Standard Oil.

Robert M. O'Connell, Chicago, Ill., for Amoco.

Before CLARK, Chief Judge, and GOLDBERG and TATE, Circuit Judges.

GOLDBERG, Circuit Judge:

> Unlike courts, which are concerned primarily with the enforcement of private rights although public interests may thereby be implicated, administrative agencies are predominantly concerned with enforcing public rights although private interests may thereby be affected. To no small degree administrative agencies for the enforcement of public rights were established by Congress because more flexible and less traditional procedures were called for than those evolved by the courts.

FCC v. National Broadcasting Co., 319 U.S. 239, 248, 63 S.Ct. 1035, 1039, 87 L.Ed. 1374 (1943) (Frankfurter, J., dissenting). These words, written long ago and for their own particular audience,[1] remain pertinent. Federal agencies are frequently charged with the task of issuing rules and resolving disputes in what might fairly be termed an administrative "parallel universe." These same agencies, however, are often called upon to vindicate public rights through the judiciary. Where the third branch is invoked, the neatness of Justice Frankfurter's dichotomy between private adjudication and agency action collapses into a unitary judicial proceeding, premised on private discord, yet shading into the realm of public concern. Faced too with a confluence of devices designed in part to address the far-reaching effects of a single lawsuit—the class action, intervention, and an agency's very authority to seek judicial enforcement—courts are at times bedeviled

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[1] In *National Broadcasting*, the Court held, under the relevant statute and regulations, that a licensed radio station could intervene as of right in FCC hearings designed to determine whether a competing channel should be licensed. 319 U.S. at 245-46, 63 S.Ct. at 1037-38.

by the complexity involved in assessing the effects of these "public" elements on the individual cases before them.

This is one of those times. Four black employees brought the present suit against their employer, the Amoco Production Company, pursuant to title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982), and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1982).[2] The initial and amended complaints together alleged that Amoco discriminated against blacks in the areas of initial job assignment, promotion, and compensation. The plaintiffs sought to represent both themselves and "a class of persons composed of (1) all black employees of the New Orleans division of AMOCO Production Company, [and] (2) all black employees who have been employed in the New Orleans division . . . at any time subsequent to June 11, 1973."[3] Record vol. 1, at 2, 53.

The Equal Employment Opportunity Commission ("EEOC") moved to intervene in the action pursuant to sections 705(g)(6) and 706(f)(1) of title VII, 42 U.S.C. §§ 2000e-4(g)(6), -5(f)(1),[4] and Fed. R. Civ. P. 24

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[2] Three of the four plaintiffs had previously filed charges of employment discrimination with the Equal Employment Opportunity Commission. The Commission determined, pursuant to § 706(f)(1) of title VII, 42 U.S.C. § 2000e-5(f)(1), that one of the complainants had "reasonable cause" to believe that Amoco had discriminated against her by failing to promote her because she is black. Although the Commission never issued a reasonable cause determination as to the other two complainants, the Commission eventually issued right-to-sue letters to each of the three. *See id.*

[3] The original complaint also sought to join as class members all black applicants who had been denied employment by the New Orleans division, but the plaintiffs abandoned this effort in their amended complaint. Record vol. 1, at 53.

[4] Section 705(g) provides in pertinent part:

(g) The Commission shall have the power—

. . . .

[Continued]

[4] [Continued]

(6) to intervene in a civil action brought under section 2000e-5 of this title by an aggrieved party against a respondent. . . .

Section 706(f)(1) provides in pertinent part:

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the

(b).[5] Since the Commission had certified the case as being of "general public importance" pursuant to section 706 (f) (1), the district court, acting through a magistrate, exercised its discretion to permit the EEOC to intervene. The Commission acknowledged that the scope of its participation would be "no greater than the scope of claims raised in Plaintiffs' complaint" and that it would not "depart from the 'field of litigation' established by the original parties," Record vol. 2, at 322—stipulations on which the order granting intervention was based, *id.* at 362.

At first, the Commission alleged in its amended complaint that it satisfied the class representation requirements of Rule 23 and should therefore be allowed to represent "itself and all blacks who are presently employed, may be employed, or who have been employed or sought employment with defendant . . . at any [time] since De-

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Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

[5] Rule 24(b) provides:

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

cember 11, 1973." Record vol. 2, at 412.[6] However, when the Supreme Court held in *General Telephone Co. v. EEOC*, 446 U.S. 318, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980), that the EEOC is not subject to Rule 23 in seeking relief for a class of individuals allegedly aggrieved by unlawful employment discrimination, the Commission filed a second amended complaint deleting all allegations addressed to the usual class representation requirements. The Commission nonetheless continued to seek classwide relief, alleging, as it had from the start, that Amoco was engaging in discriminatory employment practices in promotion, compensation, and job assignment.

Meanwhile, the district court had never certified the main plaintiffs themselves as class representatives. After a hearing on the issue, the court provisionally denied the plaintiffs' motion, preserving their right to renew the request with the support of additional evidence at a later date. Record vol. 8, at 2090-97. The district court simultaneously held that the Commission could not seek relief for the proposed class, stating that the requirements of Rule 23(a) had not been satisfied and that *General Telephone*'s class action holding applies only when the EEOC has brought an action in its own name, not when it intervenes in a private suit. *Id.* at 2095.

Thus limited, the Commission nonetheless sought to discover the birthdates and sexes of Amoco employees already identified as having held jobs encompassed within the proposed class. According to the Commission, the age and sex data was needed to conduct a multiple regression analysis of Amoco's workforce even though the plaintiffs alleged only race discrimination. Over the defendant's objection, the district court granted the Commission's mo-

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[6] Although the Commission initially alleged that Amoco also discriminated against black job applicants, it subsequently informed the court that, in accordance with the scope of the plaintiffs' suit, it would not pursue the issue of hiring discrimination. Record vol. 8, at 2030 n. 1; *id.* vol. 11, at 47.

tion to compel, but at the same time granted Amoco's motion for a protective order restricting the use of the data solely to this case absent a written order from the court.

The private plaintiffs and Amoco eventually reached a settlement, and upon their joint motion, the district court dismissed the entire action with prejudice. For its part, the Commission was understandably displeased with the nullification of what was by now five and one-half years of agency involvement as a party to the suit. The agency therefore filed a motion to reconsider the dismissal of its claims. The district court, however, was unswayed. In denying the Commission's motion, the court reiterated its prior ruling that the EEOC could not seek relief for the proposed class because the requirements of Rule 23 had not been met, and therefore held that since the private plaintiffs had settled their dispute with the defendants, no live controversy remained between the Commission and Amoco.

The Commission raises three points on appeal. First, the Commission argues that a permissive intervenor such as itself commands an independent jurisdictional base where the intervention is premised either on a conditional statutory right to intervene or on the intervenor's reliance on the same federal statute as that employed by the original plaintiff. On this view, the district court erred by dismissing the EEOC merely because the main plaintiffs had settled with the defendant. Second, the Commission contends that it is no more subject to Rule 23's class representation requirements when it intervenes in a private title VII action than when it brings suit in its own name. According to the Commission, the district court should not have denied it the status of a class representative in light of the Court's decision in *General Telephone*. Finally, the Commission asserts that the trial court's protective order restricting its use of the age and sex data unduly hampers the agency's ability to enforce the Act and to comply with its interagency obligations.

We hold that the Commission can maintain suit as a class representative but that the district court's protective order was not an abuse of discretion.

I

This is a case about justiciability. The district court held that the main plaintiffs' settlement deprived the EEOC as an intervenor of its case or controversy against the defendant employer.[7] We perceive two hamartial theories in support of this result. It could be argued first that this circuit's law of permissive intervention bottoms a district court's subject matter jurisdiction on the claims of the original plaintiffs, without whom the intervenor could not have intervened and absent whom this "vicarious" party must depart. In addition, it could somewhat more plausibly be asserted that the EEOC—a permissive intervenor whose conditional power to intervene has its source in federal law—is limited by its enabling legislation to representing only its own interests and those of the private plaintiffs. This second theory would have us affirm the district court on the ground that the EEOC has satisfied neither (A) title VII's preconditions to a suit brought in the Commission's own name, nor (B) Rule 23's class action requirements, which, although inapplicable where the EEOC files a direct action, are applicable where the EEOC merely intervenes in a private suit. On this view, the EEOC is allowed by statute to intervene solely for the purpose of facilitating the adjudication of claims between the private litigants—a role akin to that of an amicus curiae, whose asserted expertise and familiarity with a given area of law enable it to

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[7] In dismissing the Commission, the district court did not exercise its discretion pursuant to Rule 24(b) but instead ruled as a matter of law that the EEOC no longer had a "live controversy" with the defendant. We therefore pretermit deciding the circumstances under which the dismissal of a permissive intervenor such as the EEOC might be construed as an abuse of trial court discretion.

assist the court in reaching a more correct (and perhaps even just) decision. In essence, this notion of intervenor qua judicial appendage focuses less on the premises of permissive intervention in general and more on the intervenor's statutory authority to intervene.

We will address each of these arguments in turn.

A. *Unsettling Bedfellows: The Permissive Intervenor and the Reluctant Defendant*

As noted, the district court allowed the EEOC to intervene pursuant to sections 705(g)(6) and 706(f)(1) of title VII, 42 U.S.C. §§ 2000e-4(g)(6), -5(f)(1), as well as under Rule 24(b). We confront the nature of this statutory authority in Parts B and C below. For the moment, we briefly consider whether the procedural tool of party intervention enables a district court to retain jurisdiction over the claims of a permissive intervenor once those of the original plaintiffs have been dismissed.

At the outset, it is essential not to conflate what is required for a permissive intervenor to enter an action and what may be required for that intervenor to remain before the court. The two situations are not inherently congruent, the permissive intervenor falling somewhere in the gray area between spectator and participant. It is well-established, for example, that a party must have "independent jurisdictional grounds" to intervene permissively under Rule 24(b). *E.g.*, *Hunt Tool Co. v. Moore, Inc.*, 212 F.2d 685, 688 (5th Cir. 1954). *See generally* 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1917, at 592 (1972). Generally, these grounds exist where, as here, the intervenor relies on having satisfied a conditional statutory right to intervene. However, the intervenor's mere presence in an action does not clothe it with the status of an original party. To be sure, there are some senses in which an "intervenor is treated as if he were an original party and has equal standing with the original parties." *Id.* § 1920, at 611; *see Donovan v.*

Oil, Chemical, & Atomic Workers International Union, 718 F.2d 1341, 1351 (5th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 2344, 80 L.Ed.2d 818 (1984); 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 24.17 [1], at 24-185 to -186 (2d ed. 1985). The permissive intervenor can, among other things, move to dismiss the proceeding and can challenge the subject matter jurisdiction of the district court. *Id.* ¶ 24.16[2], [4]. But these participatory rights remain subject to the intervenor's threshold dependency on the original parties' claims, for it is equally well-settled that "[a]n existing suit within the court's jurisdiction is a prerequisite of an intervention, which is an ancillary proceeding in an already instituted suit." *Kendrick v. Kendrick*, 16 F.2d 744, 745 (5th Cir. 1926), *cert. denied*, 273 U.S. 758, 47 S.Ct. 472, 71 L.Ed. 877 (1927), *quoted in Truvillion v. King's Daughters Hospital*, 614 F.2d 520, 526 (5th Cir. 1980); *accord Simmons v. ICC*, 716 F.2d 40, 46 (D.C. Cir. 1983); *see also Non Commissioned Officers Association of the United States v. Army Times Publishing Co.*, 637 F.2d 372, 373 (per curiam), *modified on other grounds*, 650 F.2d 83 (5th Cir. 1981) (per curiam). It is therefore unclear whether an intervenor can broaden the scope of a litigation by asserting additional claims; to the extent it can, the district court has a concomitant prerogative—as an outgrowth of its discretionary power to withhold permission altogether—to condition the intervention so as to minimize delay and not prejudice the existing parties. *See, e.g., National Organization for Women, Inc. (NOW), Saint Paul Chapter v. Minnesota Mining & Manufacturing Co.*, 73 F.R.D. 467, 471-72 (D. Minn. 1977).

Although an intervenor's entrance does not in all respects guarantee it the right to do that which an original party could have done, a permissive intervenor need not always abandon its own claims merely because the main plaintiffs have dropped out. Thus, in the class action

context, the fact that a case becomes moot as to the named plaintiffs does not necessarily deaden the controversy as to the remaining class members. *Sosna v. Iowa*, 419 U.S. 393, 399-401, 95 S.Ct. 553, 557-558, 42 L.Ed.2d 532 (1975); *see also United States v. McDonald*, 432 U.S. 385, 394-96, 97 S.Ct. 2464, 2469-71, 53 L.Ed.2d 423 (1977) (holding that putative class member's post-judgment motion to intervene was timely filed). Even absent class certification, the Supreme Court has held that where the original plaintiffs' claims have become moot, the United States can sustain a lawsuit where it has intervened pursuant to a statute entitling it to "the same relief as if it had instituted the action." *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 430-31, 96 S.Ct. 2697, 2702, 49 L.Ed.2d 599 (1976). Consistent with this approach, district courts have the "discretion to treat the pleading of an intervenor as a separate action in order that it might adjudicate the claims raised by the intervenor." *Fuller v. Volk*, 351 F.2d 323, 328 (3d Cir. 1965). Indeed, the Third Circuit has held under Fed. R. App. P. 15(d) that an intervenor seeking review of an administrative rulemaking can continue to litigate after the original party has dismissed its petition—even though the intervenor has waited beyond the statutory period within which it could have filed its own petition for review. *United States Steel Corp. v. EPA*, 614 F.2d 843, 845-46 (3d Cir. 1979), *cited with approval in Oil, Chemical, & Atomic Workers*, 718 F.2d 1341 at 1351, 1352 (5th Cir. 1983). Similarly, we have held that private intervenors can maintain suit under title VII against their employer even though the original plaintiffs have settled their claims. *Wheeler v. American Home Products Corp. (Boyle-Midway Division)*, 563 F.2d 1233, 1237-40 (5th Cir. 1977). The law of this circuit is that there are circumstances in which an intervenor can continue to litigate after dismissal of the party that originated the action. *Id.; Magdoff v. Saphin Television & Appliance, Inc.*, 228 F.2d 214, 215 (5th Cir. 1955) (per curiam);

Hunt Tool Co., 212 F.2d at 688; *accord Walker v. Jim Dandy Co.*, 747 F.2d 1360, 1366-67 (11th Cir. 1984); *McKay v. Heyison*, 614 F.2d 899, 906-08 (3d Cir. 1980); *Alabama Electric Cooperative, Inc. v. United States*, 574 F. Supp. 27, 31 n.8 (M.D. Ala. 1983); *EEOC v. International Brotherhood of Electrical Workers*, 506 F. Supp. 480, 483 (D. Mass. 1981); *Kruse v. Zenith Radio Corp.*, 82 F.R.D. 66, 69 (W.D. Pa. 1979); *see Oil, Chemical, & Atomic Workers*, 718 F.2d at 1351.

Our task is to determine whether these circumstances exist here.

B. *Illusory Pitfalls and Commission Intervention*

The EEOC's authority to intervene in a private lawsuit is set forth in sections 705(g)(6) and 706(f)(1) of title VII, 42 U.S.C. §§ 2000e-4(g)(6), -5(f)(1). The former provision is no more than a boiler-plate clause of empowerment; it grants the Commission the ability to intervene.[8] The method of intervention appears in section 706(f)(1), which states, "Upon timely application, the court may, in its discretion permit the Commission . . . to intervene in [a] civil action upon certification that the case is of general public importance." *Id.* § 2000e-5(f)(1). There are thus three prerequisites to EEOC intervention: certification that the case is of general public importance, timely application, and permission of the district court. In this case, all three conditions were met, and the Commission was therefore properly before the court.

Appellee nonetheless argues that the Commission's intervention authority ends when the main plaintiffs decide to settle their claims. Focusing on the language in section 706(f)(1) that prescribes when the EEOC is al-

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[8] *See* note 4 *supra*.

lowed to institute suit in its own name,[9] Amoco observes that the Commission, by not having investigated, found reasonable cause to sue, or attempted to conciliate, lacks the statutory authority to maintain a direct action.[10] *See Truvillion v. King's Daughters Hospital*, 614 F.2d 520, 524-25 (5th Cir. 1980); 42 U.S.C. § 2000e-5(b). Hence, the argument runs, if we do not read title VII to mandate the dismissal of the Commission in this case, we will have effectively allowed the Commission to maintain a direct action by satisfying only the different and less demanding prerequisites to intervention. This result, we are told, Congress could not have intended.

Appellee's reasoning has all the appeal of a spacious syllogism. Congress wants limited intervention, this attempt breaks the limit, therefore Congress doesn't want this type of intervention. Title VII, however, does not

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[9] *See* note 4 *supra*.

[10] While it appears that the Commission may have satisfied the statutory prerequisites to filing its own action by investigating, finding reasonable cause, and possibly attempting to conciliate the complaint of at least one named plaintiff, *see* Record vol. 3, at 703-04; *id.* vol. 9, at 2231-34, the issue is not beyond dispute, *see id.* vol. 3 at 702, and the district court never considered the question. Premising continued jurisdiction on the EEOC's satisfaction of its direct action prerequisites would raise a host of concerns that have not been fully addressed either by the court below or by the parties on appeal. For example, it is unclear whether the EEOC attempted to conciliate with regard to all claims of employment discrimination raised by the instant litigation, and if not, whether such attempts are required by title VII. *See, e.g., Wright v. Olin Corp.*, 697 F.2d 1172, 1176-79 (4th Cir. 1982). It is also difficult to glean from the record whether the Commission's attempts were sufficiently industrious—an issue arguably placed in dispute by Amoco's contention that the EEOC did not seek conciliation beyond an initial overture. *Cf. EEOC v. Pet, Inc., Funsten Nut Div.*, 612 F.2d 1001, 1002 (5th Cir. 1980) (per curiam) (holding that EEOC efforts to conciliate were not conducted with sufficient good faith). In light of these concerns, we do not decide whether the Commission's ability to have brought suit itself would be an alternative ground upon which to remand the present case.

evince the major premise: neither the language of the statute nor its legislative history speaks directly to the scope of the EEOC's authority as an intervenor to maintain suit once the original plaintiffs have settled. Admittedly, section 706(f)(1) does create a temporal pecking order for agency action in that the EEOC's first options upon receiving a complaint are either to seek conciliation and possibly bring a direct action, or to issue a right-to-sue notice to the claimant. But the fact that the Commission's ability to intervene does not arise until after these other steps have been taken does not indicate congressional disfavor of Commission intervention to enforce title VII. Indeed, it could be argued that the requisite certificate of public importance—certainly less demanding than a direct action's formal attempt to conciliate—suggests greater sympathy for Commission intervention than for direct suit. It seems that if we are to ascertain the bounds of EEOC intervention, we must look to the purpose and logic of the statute as a whole.

When it amended the Civil Rights Act of 1964 in 1972, Congress's chief goal with regard to the EEOC was to increase the Commission's powers of enforcement.[11] Prior to that time, the Commission had been vested only with the authority to seek conciliation—a situation acknowledged to be a serious deficiency in the effort to eliminate employment discrimination.[12] Congress therefore granted the EEOC the conditional right to invoke the compensatory and injunctive powers of the federal courts di-

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[11] S.Rep. No. 415, 92d Cong., 1st Sess. 1, 3-5 (1971) [hereinafter *Senate Report*], *reprinted in Legislative History of the Equal Employment Opportunity Act of 1972*, at 410, 413-17 (1972) [hereinafter *Legislative History*]; H.R.Rep. No. 238, 92d Cong., 1st Sess., 3-5 (1971) [hereinafter *House Report*], *reprinted in* 1972 U.S.Code Cong. & Ad.News 2137, 2139-41.

[12] *Senate Report, supra* note 11, at 17, *reprinted in* Legislative History, *supra*, at 426; *House Report, supra* note 11, at 8, *reprinted in* 1972 U.S.Code Cong. & Ad.News at 2143-44.

rectly.[13] If the Commission has notified the implicated employer, investigated the claim, found reasonable cause to sue, and unsuccessfully attempted to conciliate, the agency can bring suit in its own name. Alternatively, if the Commission views a complaint to be unworthy of a reasonable cause determination or chooses not to file suit directly, it can issue a right-to-sue letter to the claimant without sacrificing the administrative role. Upon concluding that a private title VII suit is important, the Commission need only say so to intervene. 42 U.S.C. § 2000e-5(f)(1).

Conciliation clearly remains the preferred method of obtaining compliance with the Act; litigation is available only as a last resort.[14] Both the direct-action and intervention scenarios contain the possibility of conciliation without resort to judicial compulsion. The main procedural prerequisite to a suit filed by the EEOC is a good-faith attempt by the Commission to conciliate. Similarly, if the EEOC chooses not to pursue an action itself and instead intervenes, section 706(f)(1) provides that a district court may, in its discretion, stay a private action for up to sixty days pending the outcome of Commission efforts to conciliate.[15]

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[13] In allowing the EEOC to resort to the courts, Congress stopped short of conferring cease-and-desist authority in the Commission itself. *See Legislative History, supra* note 11, at 1521-57, 1767-68.

[14] *Conference Report*, S.Rep. No. 681, 92d Cong., 2d Sess. 17-18 [hereinafter *Senate Conference Report*], *reprinted in* 1972 U.S. Code Cong. & Ad.News, 2179, 2182 *and Legislative History, supra* note 11, at 1815-16; *Conference Report*, H.R.Rep. No. 899, 92d Cong., 2d Sess. 17-18 [hereinafter *House Conference Report*], *reprinted in* 1972 U.S.Code Cong. & Ad.News 2179, 2182 *and Legislative History, supra* note 11, at 1837-38; *Legislative History, supra* note 11, at 1770, 1772 (second-by-section analysis submitted by Sen. Williams, Feb. 22, 1972); *see Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 1017, 39 L.Ed.2d 147 (1974).

[15] Section 706(f)(1)'s temporary stay provision reflects Congress's desire to accommodate, on the one hand, the private plain-

This scheme sets the backdrop against which to consider whether an intervening Commission bereft of original plaintiffs lacks the authorization to continue suit absent compliance with the statute's direct action prerequisites. These prerequisites were concocted not as elixirs of EEOC power, but as procedural devices designed to shield employers, employees, courts, and the Commission from litigating employment grievances when unnecessary to effectuate the purposes of title VII. *Johnson v. Nekoosa-Edwards Paper Co.*, 558 F.2d 841, 847-48 (8th Cir.), *cert. denied*, 434 U.S. 920, 98 S.Ct. 394, 54 L.Ed.2d 276 (1977). The steps of the statute are steps of economy. It would defy reason to require compliance with procedural prerequisites whose raison d'etre—namely, the desire to avoid premature litigation—is absent. Where the parties are already in court pursuant the statutory scheme, the day for complying with the calisthentics of an alternative route has come and gone.

The present case is illustrative. On appellee's view, the Commission, having devoted the resources of five and one-half years to adjudicating its own claims of employment discrimination against Amoco, would be returned to square one. Viewed from the employer's perspective, it can hardly be said that Amoco is without notice of the charges upon which the Commission's claims are based, nor would a formalistic appeal to reinvestigation or to a redetermination of reasonable cause be sensible at this stage. In addition, assuming for the sake of argument that the Commission has not engaged in a good faith effort to conciliate,[16] we have already noted that section

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tiff's interest in seeking prompt redress over the EEOC issues a right-to-sue notice with, on the other hand, the preferred method of agency conciliation. *See House Report, supra* note 11, at 12-13, *reprinted in* 1972 U.S.Code Cong. & Ad.News at 2148.

[16] We disagree with appellee's assertion that our result today will "permit the Commission to circumvent at its whim" the requirements of § 706(f)(1). *See Brief for Appellee* at 24. The EEOC's

706(f)(1) requires this effort primarily to avoid litigation—a goal that was no longer attainable when the defendant settled six and one-half years into the original plaintiffs' suit. To the extent conciliation remains a viable possibility, the statute still affords Amoco the right to request that the district court temporarily stay the action pending the outcome of the Commission's good faith efforts to conciliate. The intent of the statute remains fulfilled.

The situation closely resembles those in *Love v. Pullman*, 404 U.S. 522, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972), and *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). In *Love*, an individual sought relief under title VII prior to the Act's 1972 amendments. Under what was then section 706(b) (current version at 42 U.S.C. § 2000e-5(c)), a claimant could not file charges with the EEOC prior to having exhausted state remedies. Love, however, had filed his claim with the EEOC prior to resolution by the state employment commission, the EEOC had referred the claim back to the state, and the state had waived its opportunity to take further action. Without any refiling by Love, the EEOC found probable cause to believe the charges were true and unsuccessfully attempted to conciliate, whereupon Love brought suit. 404 U.S. at 523-25, 92 S.Ct. at 617-18.

Responding to the argument that the complaint should be dismissed because the private plaintiff had failed to comply with the procedural prerequisites of the statute, the Supreme Court held that

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right to intervene in private title VII actions is conditioned on its first obtaining the permission of the district court. The record in this case is devoid of any suggestion that the Commission has attempted to abuse its authority to intervene, and should such a situation arise, the district court retains the discretion not to allow intervention where it would "unduly delay or prejudice the adjudication of the rights of the original parties." Fed.R.Civ.P. 24(b).

> the filing procedure followed here fully complied with the intent of the Act. . . .
>
> We see no reason why further action by the aggrieved party should be required. The procedure complies with the purpose both of § 706(b), to give state agencies a prior opportunity to consider discrimination complaints, and of § 706(d) [(current version at 42 U.S.C. § 2000e-5(e))], to ensure expedition in the filing and handling of those complaints. The respondent makes no showing of prejudice to its interests. To require a second "filing" by the aggrieved party after termination of state proceedings would serve no purpose other than the creation of an additional procedural technicality.

Id. at 525-26, 92 S.Ct. at 618-19 (footnotes omitted); *see also Williams v. Washington Metropolitan Area Transit Authority*, 721 F.2d 1412, 1418 & n. 12 (D.C. Cir. 1983) (per curiam); *Deyo v. City of Deer Park*, 664 F.2d 518, 522-23 (5th Cir. 1981); *Gamble v. Birmingham Southern Railroad Co.*, 514 F.2d 678, 688-89 & n. 6 (5th Cir. 1975) (decrying any "needless procedural barrier" to application of title VII); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460-61 (5th Cir. 1970) (same).[17] More recently, in *Zipes*, the Court held under sections 706(e) and (f) that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." 455 U.S. at 393, 102 S.Ct. at 1132 (footnote omitted); *see also*

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[17] In amending the Act later that year, Congress expressly approved of the Court's interpretation. *Senate Conference Report, supra* note 14, at 17, *reprinted in* 1972 U.S.Code Cong. & Ad.News 2179, 2181 *and Legislative History, supra* note 11, at 1815; *House Conference Report, supra* note 14, at 17, *reprinted in* 1972 U.S.Code Cong. & Ad.News 2179, 2181 *and Legislative History, supra* note 11, at 1837.

Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 103 S.Ct. 2392, 2395 n. 3, 76 L.Ed.2d 628 (1983). In so holding, the Court "honor[ed] the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer." *Id.* 455 U.S. at 398, 102 S.Ct. at 1135.

The import of these cases is clear: characterizing a statutory provision to be procedural rather than jurisdictional denotes an issue not of article III power, but of legislative and judicial method. *See McKee v. McDonnell Douglas Technical Services Co.*, 700 F.2d 260, 263-65 (5th Cir. 1983). Where a provision proves to be merely a condition precedent to bringing suit instead of a source of judicial power, the courts can, given the appropriate circumstances, equitably modify their application of the statutory terms. Determining whether the circumstances are "appropriate" in turn depends on the purpose the provision is intended to serve.

Consistent with the Supreme Court's discussion in *Love* and *Zipes*, we have treated section 706(f)(1)'s prerequisites as "procedural" rather than "jurisdictional" in nature. In *Truvillion v. King's Daughters Hospital*, 614 F.2d 520 (5th Cir. 1980), we considered the res judicata effect of a prior judgment on a plaintiff's title VII claim. In considering whether the prior judgment had been on the merits for purposes of barring the second suit, we stated that "[t]he requirements of E.E.O.C.'s notice to the respondent and a good faith investigation by the E.E.O.C. in a loose sense might be treated as jurisdictional. They are, however, nothing more than procedural prerequisites to the court's determination of the substantive issues." *Id.* at 524; *see also Nilsen v. City of Moss Point*, 674 F.2d 379, 383-84 (5th Cir. 1982).[18] Similarly,

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[18] In *Truvillion*, we held in the alternative that even if the prerequisites were characterized as "jurisdictional," they would not fall within Rule 41(b)'s definition of "adjudication upon the merits" and would therefore lack res judicata effect. 614 F.2d at 524. We

in *Pinkard v. Pullman-Standard*, 678 F.2d 1211 (5th Cir. 1982) (per curiam), *cert. denied*, 459 U.S. 1105, 103 S.Ct. 729, 74 L.Ed.2d 954 (1983), we applied *Zipes* to hold under section 706(f)(1), that "the receipt of a right-to-sue letter is not a jurisdictional prerequisite, but rather is a condition precedent subject to equitable modification." *Id.* at 1216; *accord Gooding v. Warner-Lambert Co.*, 744 F.2d 354, 358 (3d Cir. 1984); *Perdue v. Roy Stone Transfer Corp.*, 690 F.2d 1091, 1093-95 (4th Cir. 1982); *Jackson v. Seaboard Coast Line Railroad Co.*, 678 F.2d 992, 1000-10 (11th Cir. 1982).[19] Thus, while the failure to comply with a condition precedent usually means that a plaintiff cannot bring suit, *see, e.g., id.* at 1010; *Truvillion*, 614 F.2d at 525, 526; *Cutliff v. Greyhound Lines, Inc.*, 558 F.2d 803, 806-07

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based this view on the Supreme Court's decision in *Costello v. United States*, 365 U.S. 265, 81 S.Ct. 534, 5 L.Ed.2d 551 (1961), which held that "jurisdictional" dismissals under Rule 41(b) include "those dismissals which are based on a plaintiff's failure to comply with a precondition requisite the Court's going forward to determine the merits of his substantive claim." *Id.* at 285, 81 S.Ct. at 545.

Because of the obvious effects that accompany a dismissal with prejudice, the line between on-the-merits adjudications and those based on jurisdictional defects must lean towards a broader definition of "jurisdictional" under Rule 41(b). *See id.* It is therefore not inconsistent to characterize as "jurisdictional" for res judicata purposes the same statutory prerequisites that we today characterize as "procedural." *See Zipes*, 455 U.S. at 393, 102 S.Ct. at 1132; *Love*, 404 U.S. at 525-26, 92 S.Ct. at 618-19.

[19] *See Crawford v. United States Steel Corp.*, 660 F.2d 663, 666 (5th Cir. 1981); *Clanton v. Orleans Parish School Board*, 649 F.2d 1084, 1094 n. 13 (5th Cir. 1981); *Sessions v. Rusk State Hospital*, 648 F.2d 1066, 1069 (5th Cir. 1981); *cf. Stearns v. Consolidated Management, Inc.*, 747 F.2d 1105, 1110-11 (7th Cir. 1984) (treating filing requirements under Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, as conditions precedent under *Zipes*); *Vance v. Whirlpool Corp.*, 716 F.2d 1010, 1012 (4th Cir. 1983) (same), *cert. denied*, —— U.S. ——, 104 S.Ct. 1600, 2678, 80 L.Ed.2d 130 (1984); *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 595 (5th Cir. 1981) (en banc) (same).

(5th Cir. 1977), it does not mean that the district court lacks subject matter jurisdiction if the case is otherwise before it.

Viewed as a matter of procedural compliance, our concern in the present case is not whether the district court was *empowered* to hear the EEOC's claims, but rather is *why* Congress imposed these prerequisites to Commission enforcement through the judiciary. It became procedurally proper for the court below to entertain the EEOC's claims as of the moment the Commission certified the case as being of general public importance and timely filed its motion to intervene. These acts conferred on the district court the ability to grant intervenor status to the Commission under the statute directly, in consequence of the Commission's conditional statutory right to intervene under Rule 24(b)(1), and in light of Rule 24(b)'s provision for permissive intervention by the agency charged with administering a federal statute relied on by a litigant. However, unlike where a district court can, for example, be deprived of its diversity jurisdiction where the parties do not remain completely diverse throughout a litigation, the Commission's capacity to be in federal court flows from the agency's authority to enforce the Act, *General Telephone Co. v. EEOC*, 446 U.S. 318, 324, 100 S.Ct. 1698, 1703, 64 L.Ed.2d 319 (1980), and from section 706(f)(3)'s creation of federal jurisdiction over all "actions brought under" title VII, 42 U.S.C. § 2000e-5(f)(3). *See Pinkard*, 678 F.2d at 1216-17 (distinguishing "the relevant jurisdictional provision," section 706(f)(3), from section 706(f)(1)'s procedural prerequisites); *Seaboard Coast Line*, 678 F.2d at 1001-02 (same).[20] Where a solid basis for jurisdic-

[20] The present case thus differs from *Ruotolo v. Ruotolo*, 572 F.2d 336 (1st Cir. 1978), where the First Circuit held that the United States could not, as an intervenor, appeal a bankruptcy creditor's conflict-of-interest claims against the debtor's counsel once the claims had been withdrawn and the situation mooted. In

tion exists, the Commission should not be relegated to carrying out a view of the statute that is perhaps plausible in light of Congress's choice of words, but that is certainly inconsistent with any reasonable interpretation of the scheme as a whole and with the way the Commission operates. Section 706(f)(1) dictates only the method of getting there, and as we have discussed, noth-

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Ruotolo, the government had intervened pursuant to 28 U.S.C. § 2403, which accords the United States a right to intervene when the constitutionality of a federal statute affecting the public interest is at issue, as well as under Rule 24(b)'s provision for permissive intervention when a party relies on a statute administered by a federal agency. The First Circuit dismissed the appeal, noting that

> the desirability of an advisory opinion is not a substitute for justiciability. To be sure, a chief purpose behind intervention statutes such as § 2403 and Rule 24(b) is to enable the United States or one of its agencies to intervene to prevent constitutional or legal issues of potential significance from being decided with only limited input from private litigants, who may care little or nothing about the principles at stake. There is, however, a difference between permitting the United States to play an active role during the pendency of a private litigation, and permitting it to go forward with the litigation in its own right after the private parties have composed their differences. *To do the latter, we think the Government must possess some independent basis as a party apart from its status as intervenor under the two statutes in question.* The United States is here able to point to no independent source of authority permitting it to sue on behalf of itself or on behalf of others, in order to enforce the provisions of Section 39b of the Bankruptcy Act[, 11 U.S.C. § 67(b)].

572 F.2d at 338-39 (emphasis added) (citations and footnote omitted). By contrast, it is clear in the present case that the EEOC possessed in title VII the independent source of authority that the government lacked in *Ruotolo*. *See General Telephone*, 446 U.S. at 324, 100 S.Ct. at 1703; *cf. SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 458-60, 60 S.Ct. 1044, 1054-55, 84 L.Ed. 1293 (1940) (holding that the Securities and Exchange Commission "has a sufficient interest in the maintenance of its statutory authority and the performance of its public duties to entitle it through [permissive] intervention to prevent reorganization [in bankruptcy]").

ing in the statute suggests that a valid intervention by the Commission, once present, need be dispelled; indeed, the scheme as a whole compels the reverse.[21] Language can be either a tool or a chain, and we like to think Congress opted for the former.

We are thus faced with a Commission, properly before the district court *ab initio* and *in perpetuum*, charged with effectuating the salutary purposes of title VII. Confronted with a similar situation in *Wheeler v. American Home Products Corp. (Boyle-Midway Division)*, 563 F.2d 1233 (5th Cir. 1977), we held that eight private intervenors could continue to press their title VII claims after the original plaintiffs had settled with the defend-

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[21] We recognize that our holding is in tension with that of the Sixth Circuit in *Horn v. Eltra Corp.*, 686 F.2d 439 (6th Cir. 1982). In *Horn*, the district court had revoked the EEOC's status as a permissive intervenor. While the Commission's appeal of the revocation order was pending, the original title VII plaintiff settled with the defendant employer. The Sixth Circuit held that the EEOC lacked both an independent basis of jurisdiction and class certification, and that the settlement and dismissal of Horn's claim therefore rendered the Commission's appeal moot.

In what we hope is a perspicacious effort to blunt the horns of a dilemma, we do not read *Horn* to be on all fours with the present case. The Sixth Circuit did not affirm the district court's dismissal, which, judging from the panel opinion, could have been based either on an exercise of the court's discretion under Rule 24(b) or on a ruling as a matter of law under title VII. Rather, the court of appeals dismissed the appeal as moot, thereby indicating that the court viewed the Commission as attempting to intervene in a non-existent suit rather than as trying to maintain its claims as a valid party to the action. Indeed, its holding was based almost entirely on cases involving attempts to intervene where some or all of the original plaintiffs' claims had already been dismissed, *see id.* at 440-41, and at least one district court of that circuit has so interpreted the holding in *Horn*, *see EEOC v. Dayton Tire & Rubber Co.*, 573 F.Supp. 782, 786 n. 5 (S.D.Ohio 1983). Thus, while we would agree with the general proposition that a party cannot intervene in an action that no longer exists, we need not address how we might approach the situation presented in *Horn* in light of the case before us.

ants. *Id.* at 1237-38; *accord Walker v. Jim Dandy Co.*, 747 F.2d 1360, 1366 (11th Cir. 1984). It would be anomalous to hold now that the EEOC has less power to pursue its claims as an intervenor than did the eight individuals in *Wheeler*.[22] As the chief sponsor of the 1972 amendments to the Act noted, "The procedures set forth in [section 706(f)] are intended to place the primary responsibility for enforcing violations of Title VII in the Commission and to shift them from the private plaintiff. . . ." [23] We hold in light of this goal that the statute enables the EEOC to maintain suit at the sound discretion of the district court. Limited, then, by the scope of its complaint in intervention, the Commission should not have been dismissed as a matter of law upon the original plaintiffs' farewell.

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[22] This view of the permissible longevity of EEOC intervention is also consistent with the Supreme Court's decision in *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976). In *Spangler*, the United States had intervened as of right pursuant to title IX, § 902, of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-2, which provides that "the United States shall be entitled to the same relief as if it had instituted the action." Acknowledging that "the meaning of this provision is somewhat ambiguous," 427 U.S. at 430, 96 S.Ct. at 2702, the Court held that "the statute is properly read to authorize the United States to continue as a party plaintiff in this action, despite the disappearance of the original plaintiffs and the absence of any class certification, so long as such participation serves the statutory purpose, and that the presence of the United States as a party ensures that this case is not moot." *Id.* at 431, 96 S.Ct. at 2702. While the absence of similar language in title VII obviously favors appellee's cause under the maxim *expressio unius est exclusio alterius, see Horn v. Eltra Corp.*, 686 F.2d 439, 441-42 (6th Cir. 1982), our analysis of the EEOC's enforcement authority convinces us that this tension is not dispositive—especially given the dearth of legislative history surrounding § 902 and the fact that, as in *Spangler*, the EEOC's "participation serves the statutory purpose" and "ensures that this case is not moot."

[23] *Legislative History, supra* note 11, at 1772 (section-by-section analysis submitted by Sen. Williams, Feb. 22, 1972).

C. *EEOC Enforcement and the Nonapplicability of Rule 23*

As an alternative reason for dismissing the EEOC, the district court offered the Commission's noncompliance with the class action requirements of Rule 23. Since neither the original plaintiffs nor the Commission had been certified as class representatives,[24] the district court held that the Commission, proceeding solely in its own name as an intervenor, lacked a case or controversy with the defendant employer. This result is inconsistent not only with our holding in Part B above but also with that of the Supreme Court in *General Telephone Co. v. EEOC*, 446 U.S. 318, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980).

In deciding above that title VII imbues the Commission with the authority to continue litigating after the main plaintiffs have settled out of a lawsuit, we reasoned largely from the premise that the EEOC exists to represent the public interest in equal employment opportunity.[25] The Commission's method of representation comprises both conciliation and adjudication. Where the latter becomes necessary, whether by direct suit or by intervention, the Commission acts not for itself but for the people who filed complaints with the agency, for

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[24] Although the Commission initially filed an amended complaint alleging that it satisfied the requirements of Rule 23, the Commission subsequently withdrew these allegations when the Supreme Court held in *General Telephone Co. v. EEOC*, 446 U.S. 318, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980), that the EEOC can seek class-wide relief absent formal compliance with Rule 23. *Id.* at 333-34, 100 S.Ct. at 1707-08. The Commission did, however, continue to seek relief on behalf of the class of individuals aggrieved by the discriminatory employment practices alleged in the original plaintiffs' complaint.

[25] *See e.g., Georgia Power Co. v. EEOC*, 412 F.2d 462, 468 (5th Cir. 1969) ("Discrimination on the basis of race or sex is *class discrimination.*"), *quoted in Burns v. Thiokol Chemical Corp.*, 483 F.2d 300, 306 (5th Cir. 1973).

similarly situated individuals, and in the general public interest. The EEOC's ability to maintain suit "in its own name" has no meaning apart from whatever relief the Commission obtains for employees who have been treated as less than equal.

And so the Supreme Court has held. In *General Telephone*, the Court read title VII to dispense with Rule 23's class action requirements where the EEOC institutes suit pursuant to section 706. The Court observed, "The EEOC is not merely a proxy for the victims of discrimination[,] and . . . the EEOC's enforcement suits should not be considered representative actions subject to Rule 23. . . . When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination." *Id.* at 326, 100 S.Ct. at 1704 (citations omitted). In light of this rationale, we see no reason not to apply the holding of *General Telephone* to cases where the Commission seeks to enforce the Act by intervening rather than by bringing a direct action. *Accord United Telecommunications, Inc. v. Saffels*, 741 F.2d 312, 314 (10th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 1776, 84 L.Ed.2d 835 (1985); *see Johnson v. Nekoosa-Edwards Paper Co.*, 558 F.2d 841, 844-45 (8th Cir.) (noting that EEOC can intervene upon a "broad basis, the class will in effect be represented, and the scope of relief available will be as broad as if the class had been certified"), *cert. denied*, 434 U.S. 920, 98 S.Ct. 394, 54 L.Ed.2d 276 (1977); *Fields v. Beech Aircraft Corp.*, 95 F.R.D. 1, 6 (D.Kan. 1981); *Stuart v. Hewlett-Packard Co.*, 66 F.R.D. 73, 76-78 (E.D. Mich. 1975).[26] The broad

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[26] Although appellee relies for precedential support on *Horn v. Eltra Corp.*, 686 F.2d 439, 441 n. 1 (6th Cir. 1982) (stating that "*General Telephone* is limited to EEOC actions brought in its own name and not . . . to EEOC interventions in a private action"), the Sixth Circuit's statement was pure dictum, placed meekly in a note at the foot of a page.

grant of agency authority on which the Court relied in *General Telephone*, *see* 446 U.S. at 324-25, 100 S.Ct. at 1703-04, applies by its terms to all EEOC enforcement efforts under section 706, *see* 42 U.S.C. § 2000e-5(a). Having validly intervened in a private title VII suit, the Commission is no more subject to Rule 23 than if it had filed the action as an original party plaintiff.[27] "[T]he Rule has no application to a § 706 suit." 446 U.S. at 324, 100 S.Ct. at 1703.

II

The final issue in this case raises the validity of a protective order covering age and sex data. The district court granted the Commission's motion to compel discovery of the data—which the Commission asserted was necessary to perform a multiple regression analysis of Amoco's employment practices—but at the same time restricted the Commission's use of the material to the present litigation under Rule 26(c).[28] The EEOC contends

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[27] The Commission's ability to maintain suit as a de facto class representative despite the absence of the original plaintiffs does not amount to an "expansion" of the suit beyond those claims asserted by either the Commission or the original plaintiffs themselves. The district court permitted the EEOC to intervene on the condition that the agency would not press claims outside the scope of the main plaintiffs' complaint. *See* note 6 *supra; cf. Benson v. Little Rock Hilton Inn*, 87 F.R.D. 447, 449 (E.D.Ark. 1980). This condition did not, however, limit the scope of relief that is available whenever the EEOC seeks judicial enforcement under title VII. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421, 95 S.Ct. 2362, 2373, 45 L.Ed.2d 280 (1975); 42 U.S.C. 2000e-5(a). The substantive basis for the Commission's intervention may have been circumscribed, but its remedial scope was not. *See Sobel v. Yeshiva University*, 438 F.Supp. 625, 628 (S.D.N.Y. 1977); *Stuart v. Hewlett-Packard Co.*, 66 F.R.D. 73, 77-78 (E.D.Mich. 1975).

[28] The trial judge ruled orally that Amoco

> provide only the raw data and that they receive from the EEOC and the plaintiffs an absolute[,] unqualified guarantee that that information will not be dissiminated [sic] in any way, shape, or form to any other agency whatsoever without a written

that adhering to the protective order would conflict with the agency's duty to enforce the Act should it wish to bring suit based on the age and sex data, and that the court's use-restriction further forces the Commission not to comply with an interagency agreement—entered into pursuant to section 715 of the Act, 42 U.S.C. § 2000e-14—to share information concerning employment discrimination with the Office of Federal Contract Compliance Programs. Consequently, the Commission argues that the district court abused its discretion in confining the data's use to this case. The Commission is mistaken.

A party may generally do what it wants with material obtained through the discovery process, as long as it wants to do something legal. *In re Halkin*, 598 F.2d 176, 188 (D.C. Cir. 1979); *Essex Wire Corp. v. Eastern Electric Sales Co.*, 48 F.R.D. 308, 312 (E.D. Pa. 1969); *Leonia Amusement Corp. v. Loew's, Inc.*, 18 F.R.D. 503, 508 (S.D.N.Y. 1955). *But cf. Seattle Times Co. v. Rhinehart*, —— U.S. ——, 104 S.Ct. 2199, 2208-09, 81 L.Ed.2d 17 (1984) (holding that there is no absolute first amendment right to disseminate information obtained through pretrial discovery); *Greene v. Thalhimer's Department Store*, 93 F.R.D. 657, 661 (E.D. Va. 1982) (limiting use of discovered material relating to EEOC conciliation efforts). The federal rules do not themselves limit the use of discovered documents or information. Rule 26(c) does, however, afford district courts the ability to impose limits. If the party from whom discovery is sought shows "good cause," the presumption of free use dissipates, and the

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order of this Court[,] and only then upon proper motion and order of this Court[,] and that the information be in camera, that it be sealed[,] and that it be unavailable to any other agency or person or private source or any investigative groups whatsoever except the EEOC for the purposes limited to the EEOC's efforts to argue the applicability of that data in the case.

Record vol. 11, at 51-52 (hearing transcript of Mar. 16, 1983); *see also id.* vol. 8, at 2095 (written order).

district court can exercise its sound discretion to restrict what materials are obtainable, how they can be obtained, and what use can be made of them once obtained. *General Dynamics Corp. v. Selb Manufacturing Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162, 94 S.Ct. 926, 39 L.Ed.2d 116 (1974); *see* 8 C. Wright & A. Miller, *Federal Practice and Procedure* §§ 2035, 2036, at 264-65, 267-69 (1970); 4 J. Moore, J. Lucas & G. Grotheer, Jr., *Moore's Federal Practice* ¶ 26.75 (1984).

Our role, though, is not to play district court.

> [T]he standard of review of a decision of a trial court in a matter relating to discovery is whether the trial court abused its discretion in its decision. *Save the Bay, Inc. v. United States Army*, 639 F.2d 1100 (5th Cir. 1981); *Hastings v. North East Independent School District*, 615 F.2d 628 (5th Cir. 1980). It is not the responsibility of this Court to say it would have chosen a different order, to substitute our judgment; it is rather our responsibility to decide whether the district court could have entered the order which it did. *Cf. Emerick v. Fenick Industries, Inc.*, 539 F.2d 1379 (5th Cir. 1976).

Brown v. Arlen Management Corp., 663 F.2d 575, 580 (5th Cir. 1981) (per curiam); *see Wyatt v. Kaplan*, 686 F.2d 276, 283 (5th Cir. 1982); *Sanders v. Shell Oil Co.*, 678 F.2d 614, 618 (5th Cir. 1982). We must ask whether the district court abused its discretion in finding good cause to restrict the EEOC's use of the age and sex data.

Amoco argues on appeal, as it did below, that the Commission should not be permitted to utilize the discovery process in lieu of the investigative authority provided for in title VII. *See* 42 U.S.C. § 2000e-8. The EEOC argues in response that it has a statutory duty to ferret out employment discrimination, and that if the Commission becomes aware of discriminatory practices during the course of litigating an admittedly distinct claim of unequal treat-

ment, it should not be constrained from using this information as a basis upon which to initiate further proceedings. Thus, the argument runs, the district court's protective order "places the Commission in the position of violating its statutory mandate to prevent and remedy employment discrimination whereever [sic] found." *Brief for Appellant* at 30.

Although we do not take issue with the breadth of the EEOC's warrant to enforce title VII, we disagree with the Commission's conclusion. We have long recognized that the scope of an EEOC civil action is as broad as "the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970); *see also Walls v. Mississippi State Department of Public Welfare*, 730 F.2d 306, 317-18 (5th Cir. 1983); *EEOC v. Brookhaven Bank & Trust Co.*, 614 F.2d 1022, 1025 (5th Cir. 1980); *EEOC v. Occidental Life Insurance Co.*, 535 F.2d 533, 541-42 (9th Cir. 1976), *aff'd*, 432 U.S. 355, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977); *EEOC v. General Electric Co.*, 532 F.2d 359, 365 (4th Cir. 1976); *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1363 (6th Cir.), *cert. denied*, 423 U.S. 994, 96 S.Ct. 420, 46 L.Ed.2d 368 (1975); *EEOC v. McLean Trucking Co.*, 525 F.2d 1007, 1010 (6th Cir. 1975); *EEOC v. Huttig Sash & Door*, 511 F.2d 453, 455 (5th Cir. 1975). In title VII, however, Congress erected a specific system by which the Commission is to investigate charges of employment discrimination. *See* 42 U.S.C. §§ 2000e-5, -8.[29] There is nothing in the statute that au-

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[29] The situation resembles that where a private plaintiff seeks to disclose protected discovery material to the government. Faced with such a request from a civil antitrust litigation, Judge Weinfeld once observed:

> The contention that the protective order should be lifted so as to enable plaintiffs to communicate the protected information to various governmental authorities in furtherance of the

thorizes, much less mandates, the Commission to act on material discovered while intervening in a private title VII suit.[30] It would certainly not be unreasonable for Congress to have intended that the Commission investigate as provided for in the statute rather than through the back door of discovery. *See, EEOC v. Shell Oil Co.*, —— U.S. ——, 104 S.Ct. 1621, 1627-37, 80 L.Ed.2d 41 (1984) (discussing relationship among charge, notice, and judicial enforcement provisions of title VII). *Valley Industrial Services, Inc. v. EEOC*, 570 F. Supp. 902, 906 (N.D. Cal. 1983) (discussing Commission's investigative powers).

Thus, absent a clear indication that Congress intended otherwise, we are unable to say that the district court abused its discretion by issuing a protective order in this case. Title VII does not require that the EEOC receive full use of material discovered as an intervenor, whether that use is further investigation, litigation, or interagency cooperation. *See, e.g., Haykel v. G.F.L. Furniture Leasing Co.*, 76 F.R.D. 386, 391 (N.D. Ga. 1976). An employer's interest in preserving the confidentiality of its records for some purposes is sufficient "good cause" where

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> public interest is without substance. The governmental authorities, whether executive or congressional, if interested in obtaining the information, have the available means and power, subpoena and otherwise, to obtain or compel its production. The vindication of the public interest in the enforcement of the criminal laws rests with the Department of Justice and not with the plaintiffs who are asserting private antitrust claims.

Data Digests, Inc. v. Standard & Poor's Corp., 57 F.R.D. 42, 44 (S.D.N.Y. 1972) (footnote omitted). *But cf. Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405, 410-11 (N.D.N.Y. 1973). Similarly, the EEOC, if sufficiently interested in the birthdates and genders of Amoco employees, can resort to its investigative authority under the Act. *See* 42 U.S.C. § 2000e-8.

[30] We do not, of course, suggest the converse—namely, that the statute prohibits the Commission from acting on discovery material. Whether or not to issue a protective order remains for the discretion of the trial court.

the Commission is not authorized to invade that privacy for all purposes.[31]

III

It should go without saying that title VII merits the most generous of applications.[32] This has been and remains the tradition of civil rights litigation in the federal courts—a tradition of solicitude for those least able to conquer their inequality in the face of self-appointed superiors.

Cognizant of the disparities between litigants in employment discrimination suits, we have often characterized these suits as contemporary David and Goliath confrontations.[33] Our mettle is best tested where, as in the present case, David's slingshot threatens to become Goliath's shield. When vested with the authority to eradicate unequal treatment in the workplace, a federal agency is entitled to exercise that authority to the limit. Congress created a scheme with a purpose, and neither means nor ends should ever lose sight of the other.

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[31] We note in addition that the district court expressly reserved the power to rescind its order upon a party's application. This caveat suggests that the court might, if faced with a properly substantiated Commission request, release the discovered material to the EEOC for uses consistent with the agency's role under the statute.

[32] As the Supreme Court stated in *Albemarle Paper Co., v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975), "Congress' purpose in vesting a variety of 'discretionary' powers in the courts was not to limit appellate review of trial courts, or to invite inconsistency and caprice, but rather to make possible the 'fashion[ing] [of] the most complete relief possible.'" *Id.* at 421, 95 S.Ct. at 2373 (quoting *Legislative History, supra* note 11, at 1773-74 (section-by-section analysis submitted by Sen. Williams, Feb. 22, 1972)); *see also Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30, 91 S.Ct. 849, 852-53, 28 L.Ed.2d 158 (1971).

[33] *See Chromcraft Corp. v. EEOC*, 465 F.2d 745, 748 (5th Cir. 1972); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 467 (5th Cir. 1970); *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1005 (5th Cir. 1969); *Jenkins v. United Gas Corp.*, 400 F.2d 28, 33 (5th Cir. 1968).

As we noted at the outset, this case raises a number of bedeviling complexities—complexities which have been well-explored by both employer and Commission on appeal. In essence, though, the employer's argument favors statutory form over substance, and in so doing loses sight of both congressional method and goal. Since title VII contemplates EEOC intervention in appropriate cases, we hold that, having properly intervened, the EEOC can maintain suit within the scope of the original plaintiffs' claims even after those plaintiffs have settled. Moreover, we hold that Rule 23's class action prerequisites are as inapplicable when the EEOC intervenes as when it brings a direct suit. However, given that the statute is not a carte blanche for agency investigation, we also hold that the district court did not abuse its discretion in restricting the Commission's use of discovered age and sex data to this litigation.

On balance, this federal agency's resort to the courts has been sound.

AFFIRMED IN PART, REVERSED IN PART and REMANDED.

CLARK, Chief Judge, concurring specially:

I concur in Parts I-II, in the penultimate and ultimate paragraphs of Part III, and in the result reached by Judge Goldberg's opinion. The merits of the defendant's actions remain to be adjudicated. I do not see how it can be classed as a self-appointed superior. Furthermore, I do not consider the present litigation between a competently staffed, publicly funded government agency and the defendant to be properly characterized as a David and Goliath confrontation.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 76-3863 SECTION "M"

JACQUELINE M. HARRIS, HARDY J. OSBORNE, LILLIE JEAN SMITH, ROBERT WILLIAMS, on behalf of themselves and all others similarly situated,

Plaintiffs,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Intervenor

v.

AMOCO PRODUCTION COMPANY,
Defendant.

[Filed July 21, 1983]

JOINT MOTION TO DISMISS WITH PREJUDICE AND ORDER

NOW INTO COURT, through undersigned counsel, come Plaintiffs Jacqueline M. Harris, Hardy J. Osborne, Lillie Jean Smith and Robert Williams, and Defendant, Amoco Production Company, and respectfully move this Honorable Court to dismiss, with prejudice, all of such Plaintiffs' claims and demands on the basis that the Plaintiffs and Defendant have reached an amicable compromise and settlement which calls for, among other things, the resignation from Defendant's employment by

Plaintiffs Jacqueline M. Harris and Hardy J. Osborne, Plaintiffs Robert Williams and Lillie Jean Smith having heretofore resigned, and the dismissal of this action;

IT IS ORDERED, ADJUDGED AND DECREED that this action is hereby dismissed, with prejudice, as to all claims and demands of Plaintiffs Jacqueline M. Harris, Hardy J. Osborne, Lillie Jean Smith and Robert Williams, each party to bear his or her own respective costs in this matter.

New Orleans, Louisiana, this 22nd day of July, 1983.

/s/ Peter Beer
United States District Judge

Respectfully submitted:

/s/ Ann Woolhandler
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APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 76-3863 SECTION M

JACQUELINE HARRIS, et al.,

versus

AMOCO PRODUCTION COMPANY

[Filed Aug. 29, 1983]

MINUTE ENTRY

Plaintiff-intervenor Equal Employment Opportunity Commission has filed a Motion for Reconsideration of this court's granting of a Joint Motion to Dismiss by plaintiffs Jacqueline M. Harris, et al and defendant Amoco Production Company. That joint motion was based upon a settlement between plaintiffs and defendant and was signed on July 22, 1983. Plaintiffs and defendant have also filed a Joint Motion for Protective Order which is opposed by the Commission. All parties agreed to waive their rights to oral argument and to submit the matter on briefs for this court's consideration.

The Commission in its motion for reconsideration argues that this court should reconsider its order of dismissal because it was based on a settlement to which it was not a party and because it contends that its action against defendant remains a live controversy. I disagree and find that there remains no live controversy by the Commission against defendant. The private plaintiffs

settled their claims with defendant. By minute entry dated April 28, 1983, I denied the motions of plaintiffs and intervenor for class certification, and in so doing, found specifically that the Commission had no authority to seek relief for the proposed class, since the Rule 23(a) requisites for certification were not met. *Horn v. Eltra Corp.*, 686 F.2d 439, 441 n.1 (6th Cir. 1982). The Commission's Motion for Reconsideration is therefore denied.

Plaintiffs and defendant have jointly moved for a protective order applicable to plaintiffs, defendant and plaintiff-intervenor, prohibiting any publication to any person or entity of any of the terms of any settlement agreement entered into in connection with this matter. Movants argue that the entry of such an order is essential to the integrity of the settlement. They also argue that disclosure of settlement terms could mistakenly lead persons not involved in the suit to conclude that admissions of liability were made; and finally, defendant argues that publication of settlement terms could prejudice it in that persons might be encouraged to file "frivolous" lawsuits in hope of obtaining settlement consideration. Movants cite FRCP 26(c), authorizing this court to fashion protective orders to protect confidential information in a discovery context, as authority for the entry of a protective order herein.

Plaintiff-intervenor objects to the entry of a protective order, calling it instead a "gag order." It argues that such an order would be unconstitutional as a prior restraint on the speech of Commission employees. Prior restraint has traditionally been defined as a predetermined judicial prohibition restraining specified expression, *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 467 (5th Cir. 1980), and is justified only if the expression sought to be restrained "surely will result in direct, immediate, and irreparable damage." *Id.* at 473. I find that the so-called prejudice that the defendant will suffer as a result of disclosure of the settlement herein is no more

than is generally attendant to such cases, and therefore is not warranted. Accordingly, the joint motion of plaintiffs and defendant for entry of a protective order is denied.

/s/ Peter Beer
United States District Judge

APPENDIX D

STATUTORY PROVISIONS INVOLVED

Fed. R. Civ. P. 24(b) provides as follows:

* * * *

(b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Section 706 of the Civil Rights Act of 1964, 42 USC § 2000e-5 (1980), provides in part as follows:

* * * *

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent: contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons con-

cerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

* * * *

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; . . . .

(1) If within thirty days after a charge is filed with the Commisison or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political sub-

division. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

* * * *